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Supreme Court of the United States

OCTOBER TERM, 1957

No. 80

JOHN HENRY HARMON, III, *Petitioner*,

v.

WILBER M. BRUCKER, Individually and as Secretary of the Department of the Army, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 99) is reported at 137 F. Supp. 475. The opinions of the Court of Appeals, i.e., the majority opinion of Judge Prettyman and the dissenting opinion of Judge Bazelon (R. 121) are reported at 243 F. 2d 613.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1957 (R. 147). The petition for a writ of certiorari was filed on February 15, 1957, and was granted on May 13, 1957 (R. 151). The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254.

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The Constitutional provisions involved are the First, Fifth and Sixth Amendments to the Constitution of the United States. The statutes involved are the Act of May 5, 1950, 64 Stat. 145, 10 U.S.C. 652a; Section 4(b) of the Universal Military Training & Service Act, 62 Stat. 606, 50 U.S.C. App. 454(b); the Act of June 22, 1944, 58 Stat. 286, 38 U.S.C. 693h; and the Act of August 2, 1946, 60 Stat. 837, 5 U.S.C. 191a. The Regulations involved are Department of Defense Directive 5210.9, issued April 7, 1954 (set forth in full at pp. 33-45 of the Record), Army Regulation 615-375, Paragraph (2)(b), and Army Regulation 615-360, Paragraphs (7) through (9). All Constitutional, statutory and regulatory provisions, except as otherwise noted, are set forth in the Appendix, *infra*, at pp. 49-54.

QUESTIONS PRESENTED

1. Did the District Court have jurisdiction to review a less than honorable discharge furnished an inducted soldier as a security risk (because of non criminal, constitutionally-protected conduct occurring primarily, if not exclusively, prior to induction), and to grant the relief requested by petitioner where the discharge certificate did not accurately reflect the

character of petitioner's excellent military record and violated applicable regulations, statutes and constitutional provisions?

2. (a) While Section 4(b) of the Universal Military Training & Service Act may have authorized the Secretary of Defense to remove "security risks" from the Armed Forces, was Department of Defense Directive 5210.9, par. VIII(F)5 (under which petitioner was stigmatized for life with a less than honorable discharge certificate for having engaged in constitutionally-protected and non-criminal conduct extraneous to the character of his actual military service) invalidly authorized, *ultra vires* and void?

(b) If not, is Section 4(b) of the Universal Military Training & Service Act, as applied to petitioner, in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States?

3. Petitioner was not found disloyal by respondent, and the character and efficiency of his actual military service up to the time of his discharge were admittedly excellent. His less than honorable discharge as a security risk was based on non-criminal conduct which occurred primarily, if not exclusively, prior to his induction, and was wholly unrelated to the actual character of his military service. Moreover, he was given neither a hearing prior to his discharge nor any statement of the reasons why he was declared a security risk, nor any opportunity to confront and cross-examine the witnesses against him. Was the aforesaid action of respondent in furnishing petitioner a less than honorable discharge certificate (which, by reflecting more than a record of military service, brings reproach and dishonor in civilian life and extinguishes petitioner's right to certain valuable state

veterans' benefits), in violation of the First, Fifth and Sixth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

A. Petitioner

Petitioner, a resident of the State of New York and prospective applicant for admission to the Bar, was duly inducted into the Army on October 31, 1952. Former Private Harmon's induction was accomplished under the provisions of the Universal Military Training & Service Act. 62 Stat. 604, 50 U.S.C. App. 451 *et seq.* (R. 2-3, 19).

On May 7, 1953, petitioner was interrogated concerning his beliefs, attitudes, associations and opinions at the Indiantown Gap Military Reservation, Indiantown Gap, Pennsylvania, where he was then stationed (R. 91-98). With respect to some of the questions asked by the military authorities, petitioner invoked his privilege against self-incrimination (Uniform Code of Military Justice, Article 31, 64 Stat. 118, 50 U.S.C. 602), but denied membership in the Communist Party.[1]

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[1] On October 22, 1954, petitioner explained his invocation of the privilege against self-incrimination in testifying under oath before the Army Discharge Review Board, as follows:

> "Applicant: Well, quite frankly, I was afraid for one reason and, secondly, I did not have the advice of counsel. I was afraid in the sense that when I was first sent up to the Indiantown Gap I was awakened from sleep and introduced to six gentlemen from the Counter Intelligence Corps, and that included the Commanding Officer, a stenographer, and a Sergeant-at-Arms, and I was searched and then taken down to G-2 headquarters and there I was questioned by the battery of these gentlemen from the Counter Intelligence Corps.

On February 9, 1954, petitioner was notified by the Adjutant General that he was to reply to certain derogatory information which had been received concerning him, to wit:

"That you—

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did not feel that I could truthfully and honestly answer all the questions that were presented to me—when they were thrown at me in such rapid fire. (R. 64) • • •

"Member: Mr. Harmon, on the 7th of May, 1953 you were asked certain questions in regard to which have been repeated this morning by your counsel, and at that time you refused to answer those questions, and you tell us this morning you refused based on the fact that you did not have advice of counsel, and you did not know the names of all the organizations that might be listed on the Attorney General's list. • • •. I don't see why you had to have advice of counsel to say you did not belong to them.

"Applicant: Well, sir, I will give you an example. When I was interrogated in May of 1953, I mentioned that I was asked questions all at once, and some of the questions ran to this extent. To whom have you given the plans of Indiantown Gap Military Reservation? How long have you been a courier for the Soviet Union or for some of its satellites. My instant reaction was, what is going on here, you know, I hadn't realized that I was such a cloak and dagger personality. I saw that I was afraid, and really being fearful I did not wish to answer these questions for fear I might say something which was not actually the truth. (R. 71) • • •

"Counsel: Do you think if you had an opportunity to have carefully considered the questions and your answers to the questions, if you had done so in a calm and deliberate atmosphere rather than through fear, do you believe you would have answered as you did on the investigation report?

"Applicant: I think if I had time to I would have given more or less similar responses that I had given in the file with AGO. (R. 84-85) • • •

"Presiding Officer: What were you apprehensive of?

"Applicant: Well, sir, when someone walks in with a group

"a. In 1951 and 1952, were employed at Camp Lakeland which was reported to be a Communist operated camp.

"b. In 1949, were employed by the Detroit Urban League which was reported to be a subversive organization.

"c. In 1952, registered to vote in New York City with the American Labor Party. The American Labor Party is cited by the House Committee on Un-American Activities as being under Communist control in New York City.

"d. Solicited contributions of money for the defense of persons under indictment for violation of the Smith Act" (R. 3).

The letter also contained derogatory information with respect to petitioner's father and step-mother, who were alleged to have had "subversive" associations, and further stated that petitioner was alleged to have associated with persons who were Communists or Communist sympathizers (R. 3-4).

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of men, walks into the room here you had just been awakened, as I explained, by my Commanding Officer * * *

"Presiding Officer: Was your Commanding Officer present?

"Applicant: Yes, sir, I don't know how many gentlemen from the CID and a Lieutenant from G-2, a Sergeant with a .45 pistol strapped to his hip, and why someone should come into my room with weapons, I couldn't understand. I was apprehensive.

"Presiding Officer: You were apprehensive for fear they would shoot you?

"Applicant: I can't explain my subconscious reaction at the time.

"Presiding Officer: You were just apprehensive?

"Applicant: That is correct, sir." (R. 87)

On March 11, 1954, petitioner replied to the letter of allegations, stating that he was not then nor had he ever been a member of the Communist Party, and in answer to the derogatory information with respect to his father and step-mother, petitioner informed the Adjutant General that:

> "It is with deepest moral indignity coupled with a devout sense of filial piety, that I refuse to answer the derogatory statements made under allegations e and f. As neither my father nor step-mother are employed in any capacity by the federal government, I am led to the conclusion that derogatory information concerning them is wholly irrelevant to the case at hand" (R. 4-6).

The allegations in the letter of the Adjutant General dated February 9, 1954, related solely to lawful and legal activities and associations which petitioner carried on as part of his civilian life prior to the time of his induction except that (1) petitioner continued his association with his father and step-mother; and (2) in November 1952, he wrote a letter to two friends suggesting that they make financial contribution to assist the defense of two individuals who had been indicted for a violation of the "Smith Act" (R. 7-8, 100).

On April 2, 1954, the Adjutant General, by order of the Secretary of the Army, informed petitioner's Commanding Officer that the proposed discharge of petitioner as "disloyal or subversive" under the provisions of Army Regulation 615-370 had not been favorably considered. Instead, petitioner was to be assigned to non-sensitive duty in the lowest pay grade and retained in the Army establishment (R. 6-7). At the same time, petitioner was personally informed by the Adjutant General as follows:

"1. Reference is made to letter from this office dated 9 February 1954.

"2. The allegations in your case and your reply thereto have been reviewed in the Department of the Army. It has been determined that you will be retained in the service in your present grade, that you will not be promoted and that upon completion of your term of service you will be discharged with a type of discharge appropriate to the character of service you have rendered as of the date you are eligible for separation.

"BY ORDER OF THE SECRETARY OF THE ARMY"

(R. 7, 100).

However, 55 days later and on May 26, 1954, without notice to petitioner or providing him with a hearing, the Adjutant General, by order of respondent, rescinded the provisions of the previous order and informed petitioner's Commanding Officer that he would be discharged under the provisions of Army Regulation 615-370 and given an "Undesirable Discharge" (R. 7, 20). On June 2, 1954, petitioner was separated from the Army of the United States under the provisions of Army Regulation 615-370 at Transfer Point, Camp Pickett, Virginia, with an "Undesirable Discharge Certificate" (R. 13, 14).

It is conceded that the character and efficiency of petitioner's service in the Army of the United States from the date of his induction until the date of his discharge were excellent, and petitioner's service record bears two character and efficiency recommendations for excellent service (R. 9, 20, 101).[2]

[2] • • • [I]n its argument [the Government] concede[d] that it has never found [petitioner] either disloyal or loyal." (137 F. Supp. 475, 477.)

B. Proceedings Subsequent to Discharge

On June 8, 1954, petitioner applied to the Army Discharge Review Board to have the nature of his discharge certificate changed from Undesirable to Honorable. On October 22, 1954, petitioner appeared before the Army Discharge Review Board accompanied by counsel and testified under oath that he had never been a member of the Communist Party, or of any Communist cell or unit, or of any Communist organization, or of any organization that advocated the overthrow of the government, or of any organization which advocated a policy of approving or advocating the commission of acts of force or violence to deny other persons their rights under the Constitution, or of any organization which seeks to alter the form of government of the United States by unconstitutional means, or of any organization which, to his knowledge, had engaged in subversive activities of any kind or nature (R. 63-68). Petitioner further testified that he was then and had always been completely and unswervingly loyal to the government of the United States and would not hesitate to lay down his life in defense of the United States against any and all of its enemies whomsoever (R. 69, 101).

On November 15, 1954, petitioner was informed that his application for a change of his discharge certificate from Undesirable to Honorable had been denied (R. 10). Thereupon, petitioner applied to the Army Board for the Correction of Military Records, but on January 27, 1955, his appeal was denied (R. 10). On February 1, 1955, petitioner appealed to the Secretary of the Army, but no action was taken, and on May 2, 1955, petitioner commenced suit in the District Court for the District of Columbia.

C. Administrative Proceedings Subsequent to the Filing of Suit

Subsequent to the filing of the complaint, petitioner's counsel was informed by Hugh M. Milton II Assistant Secretary of the Army, that the Army Board for the Correction of Military Records had been ordered to undertake "a fresh evaluation of the entire case" (R. 51-52). On July 7, 1955, petitioner's counsel replied to Mr. Milton's letter and informed him that petitioner had commenced suit, testing the validity of petitioner's "Undesirable Discharge," but nevertheless offered to participate in a hearing before the Army Board for the Correction of Military Records (R. 52-53). On July 20, 1955, petitioner's counsel received another letter from Mr. Milton in which he stated that the Executive Secretary for the Army Board for the Correction of Military Records had scheduled a hearing for July 27, 1955, but that the Army could not agree that the discharge certificate was to be based on the character of the soldier's military service (R. 54). On July 25, 1955, petitioner's counsel informed Mr. Milton that appellant would not appear before the Army Board for the Correction of Military Records, inasmuch as a hearing before said board "would serve no useful purpose," since the Army and petitioner were in basic disagreement on the law relating to the issuance of discharge certificates (R. 55-56). On November 10, 1955, the Assistant Secretary of the Army denied petitioner's application for a correction of his military record (R. 57).

D. Court Proceedings

On May 2, 1955, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment declaring

invalid his "Undesirable Discharge" and for a declaration that the action of respondent was illegal and unconstitutional. An answer was filed on July 19, 1955. Thereafter, an order was entered granting petitioner's motion to amend his complaint by substituting Wilber M. Brucker in place of Robert T. Stevens as defendant in the within action. Defendant Brucker was appointed Secretary of the Army in place of defendant Stevens, who had resigned. It was stipulated by counsel that the answer which was filed was adopted by the substituted defendant.

After filing of the answer, petitioner and respondent cross-moved for summary judgment. On November 28, 1955, respondent was granted leave to amend his answer to allege that, while petitioner's discharge certificate recited that the authority for his discharge was Army Regulation 615-370, petitioner was in fact discharged under the authority of Department of Defense Directive 5210.9, dated April 7, 1954, and that, while respondent admitted that petitioner's service record was marked "excellent" as to character and efficiency for the periods November 12, 1952, to July 24, 1953, and August 2, 1953, to April 24, 1954, the balance of petitioner's service record was marked "Unknown" as to character and efficiency.[3] On January 24, 1956, the District Court below granted respondent's motion for summary judgment on the sole ground that the court had no jurisdiction to review respondent's action (R. 105). Jurisdiction of the cause in the District Court was based on Sections 11-305 and 11-306 of the District of Columbia Code, on 28 U.S.C., Sections 1331, 2201 (the Declaratory

[3] However, the "Unknown" ratings are in no way disqualifying. See, AR 615-360, par. 8(b), Appendix, *infra*, p. 53.

Judgment Act), 2202 and on 5 U.S.C., Section 1009. Jurisdiction was also based on the First, Fifth and Sixth Amendments to the Constitution and on Articles I and III thereof.

On June 6, 1956, petitioner was notified by respondent that the character of his discharge was changed from "Undesirable" to "General (Under Honorable Conditions)." Thereupon, respondent filed a memorandum in the Court of Appeals suggesting mootness, which was denied by order of the Court of Appeals on August 17, 1956. On January 31, 1957, the Court of Appeals, by a 2-1 vote, affirmed the decision of the District Court (243 F. 2d 613), Judge Bazelon dissenting (*Id.*, at pp. 622-27).

SUMMARY OF ARGUMENT

Petitioner was inducted into the Army under the Universal Military Training & Service Act of 1948. After nineteen months of active military service, during which he received "excellent" ratings both as to character and efficiency, he was separated from the Army, without notice or hearing, and furnished an "Undesirable Discharge Certificate."[4] Since a discharge is a formal, final judgment by the government on the military record of a soldier, we think it basic that a soldier has a right to an honorable discharge if his military record merits it, and that he cannot be held to answer, in the consideration of his discharge, for matters extraneous to that record. Traditional and established Army policy makes it evident that the character of a military dis-

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[4] On April 11, 1956, the Army upgraded petitioner's discharge certificate from "Undesirable" to "General, under honorable conditions." (243 F. 2d 613, 623, n. 2.)

charge certificate is rooted in and fashioned from the conduct of a soldier during his time of service. And while the discharge certificate is issued by the military, the district court readily recognized that it has tangible and practical consequences in civilian life. The District Judge said: "To an honorable discharge accrue property rights, civil rights, and community respect and honor. * * * Conversely, one receiving an adverse discharge certificate must expect to encounter substantial prejudice in civilian life." (137 F. Supp. 475, 478.) Nevertheless the decision of the Court of Appeals permits the Army to stigmatize an inductee as a "security risk" for having engaged, while in civilian life, in constitutionally-protected and non-criminal conduct and associations (243 F. 2d 613, 620). Inasmuch as Department of Defense Directive 5210.9 affects the discharge certificates of thousands of young Americans inducted into the Armed Forces, and countless others previously released to the inactive reserve, the decision below deprives millions of young Americans (with excellent military records) of honorable discharge certificates, whenever it is asserted in the name of "security" that they are unsuitable for retention in the military establishment.

The issues which this Court is asked to decide arise from Department of Defense Directive 5210.9, establishing the "Military Personnel Security Program" under the authority of Section 4(b) of the Universal Military Training & Service Act, 62 Stat. 606, 50 U.S.C. App. § 454(b). Or, as stated by Judge Bazelon in his dissent below:

> "* * * whether the Universal Military Training & Service Act * * *, 62 Stat. 606, 50 U.S.C. § 454(b), pursuant to which Directive 5210.9 was promul-

gated, authorizes issuance of less than an 'honorable discharge' certificate, in the circumstances of this case." 243 F. 2d 613, at p. 627.

On the major questions below, the Court of Appeals was divided. Petitioner contends, with Judge Bazelon, that the majority erred. Petitioner's challenge is premised on the assertion that a soldier's right to a military discharge certificate accurately reflecting the character of his military service may be judicially protected from arbitrary encroachment by the military, and that a man who serves in the Army with a rating of "excellent" cannot be furnished a discharge certificate (for non-criminal, constitutionally-protected conduct occurring primarily, if not exclusively, prior to induction), which, by reflecting more than a record of military service, brings reproach and dishonor in civilian life, and extinguishes his right to valuable veterans' benefits.

I

The district court denied petitioner relief solely because the District Judge believed he lacked jurisdiction to review the issuance of petitioner's discharge certificate (137 F. Supp. 475, 478). The decision of the district court, as well as the majority opinion of the court below were based on *Gentila* v. *Pace* (C.A.D.C.), 193 F. 2d 924, cert. den. 342 U.S. 943. However, this very question was left unanswered by this Court in *Patterson* v. *Lamb*, 329 U.S. 539, 542.[5] When it is considered that a discharge certificate establishes a *valuable status* conferring "property rights, civil rights, and com-

[5] This was the view of Judge Youngdahl in the District Court (137 F. Supp. 475, 478, n. 4), Judge Bazelon in the dissent below (243 F. 2d, at p. 627), and the late Judge Frank in *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, 135, n. 1.

munity respect and honor," we think it evident that the district court had jurisdiction to review respondent's action (1) if arbitrary, capricious, or clearly erroneous as a matter of law, absent clear and unequivocal Congressional language to the contrary; (2) if constitutional rights have been invaded; and (3) if the challenged administrative action was bottomed on an unconstitutional, invalidly authorized or *ultra vires* administrative regulation. Moreover, even if the district court lacked jurisdiction to interfere with respondent's discretion and was unable to compel him to issue petitioner an "honorable discharge" certificate, it had ample jurisdiction to declare invalid and unconstitutional respondent's action which resulted in petitioner's less than "honorable discharge" for unconstitutional and invalid reasons.

II

Department of Defense Directive 5210.9, under which petitioner allegedly received his less than "honorable discharge" was invalidly authorized, *ultra vires* and void. While Congress may have authorized the Secretary of Defense to remove "security risks" from the Armed Forces, Congress did not, and could not, authorize him or the Secretary of the Army or anyone else, to stigmatize an inductee for life with a less than "honorable discharge" certificate by reason of constitutionally-protected and non-criminal conduct extraneous to the character of the actual military service the soldier performed.

III

Respondent's action violated the First, Fifth and Sixth Amendments to the Constitution. In this connection, the Court will note that the constitutional

issues are relevant, not to petitioner's separation from the Army Establishment, but to his stigmatization for life with a less than "honorable discharge" (a "badge of infamy") for alleged "subversive" conduct and associations, and the manner in which the destruction of his good name and personal honor was accomplished. Here, at least in part, the issue is petitioner's right to freedom from government defamation. The less than "honorable discharge" imposed on petitioner for being a "security risk" is the imposition of "punishment" under the Sixth Amendment, which requires all the safeguards of a judicial trial. This is especially true in the instant case, since not only are petitioner's job opportunities and reputation seriously impaired, but his right to valuable veterans' benefits completely extinguished.

Rights to freedom of thought, association and belief cannot be infringed by government action defaming and dishonoring an individual who has exercised them, especially when such action cannot be justified in the national security interest. The constitutional protection of the First and Fifth Amendments are applicable, not to petitioner's separation from the Army Establishment, but to the stigmatization of his record of military service, which, on other than political considerations, warranted an "honorable discharge." Such action was also arbitrary, and constitutes a denial of "substantive due process."

ARGUMENT

I

THE DISTRICT COURT HAD JURISDICTION TO REVIEW THE ACTION OF RESPONDENT

The majority ruling below denying jurisdiction to review petitioner's less than "honorable discharge" was based on that court's prior ruling in *Gentila* v. *Pace* (C.A.D.C.), 193 F. 2d 924, cert. den. 342 U.S. 942.[6] We think the court below has construed too broadly its ruling in *Gentila* and has construed too narrowly the scope of judicial review in cases of this character. Cf. *Peters* v. *Hobby*, 349 U.S. 331, 347.

In 1944, Congress created the Army Discharge Review Board, 58 Stat. 286, 38 U.S.C. 693h. Thereafter, it authorized establishment of the Army Board for the Correction of Military Records, 60 Stat. 837, 5 U.S.C. 191a. These statutes made determinations of the Army Discharge Review Board "final, subject only to review by the Secretary of the Army," 58 Stat. 286, 38 U.S.C. 696h; and determinations of the Army Board for the Correction of Military Records "final and conclusive on all officers of the Government except when procured by means of fraud," 60 Stat. 837, 5 U.S.C. 191a. The scope of judicial review of the military's action in issuing discharge certificates has not yet been authoritatively decided by this Court. The precise question posed by the instant case was left open in

[6] It was also based in part on *Orloff* v. *Willoughby*, 345 U.S. 83, where this Court held that a doctor lawfully inducted into the Army could not review his specific duty assignments by *habeas corpus proceedings*. (*Id.*, at p. 93.) However, when Congress subsequently enacted legislation providing that doctors were to serve in the Army in a commissioned status, the holding in *Orloff*, did not preclude judicial review. See, *Nelson* v. *Peckham* (4 Cir.), 210 F. 2d 574.

Patterson v. *Lamb*, 329 U.S. 539, where Mr. Justice Black stated:

> "Whether and to what extent the courts have power to review or control the Department's action in fixing the type of discharge certificate issued to soldiers is a question we need not here determine." *Id.*, at p. 542.

A. As to Questions of Law and Arbitrary and Capricious Administrative Action

In *Gentila*, *supra*, which involved a "dishonorable discharge" for desertion which the veteran was seeking to have set aside, alleging insanity at the time of desertion, the Court of Appeals held that Congress had precluded review of the Army Discharge Review Board's "erroneous findings of fact." Judge Edgerton stated:

> "At the very least, we think the statute intends that merely erroneous findings of fact by the Discharge Review Board shall not be revised by a court." *Id.*, 193 F. 2d, at p. 927.

However, when it is considered that here, the district court said: "[T]he discharge certificate * * * has tangible and practical consequences in civilian life. To an Honorable discharge accrue property rights, civil rights, and community respect and honor * * * [but] one receiving an adverse discharge certificate must expect to encounter substantial prejudice in civilian life" (137 F. Supp. 475, 478); it becomes evident, absent clear and unequivocal Congressional language to the contrary, that arbitrary, capricious, or clearly erroneous action is reviewable. Cf. *McGrath* v. *Kristensen*, 340 U.S. 162, 169; *Dismuke* v. *United States*, 297 U.S. 167, 172.

If for example, Congress had said, as it did with respect to veterans' benefits, that the administrative determination is "final and conclusive" * * * and * * * no court of the United States shall have jurisdiction to review * * * such [determination]," respondent's position in this respect would be considerably strengthened. See, *Longernecker* v. *Higley* (C.A.D.C.), 229 F. 2d 27, 28.[7] However, where Congress says that proceedings of the Army Discharge Review Board are "final, subject only to review by the Secretary of the Army," 58 Stat. 286, 38 U.S.C. 693h, and proceedings before the Army Board for the Correction of Military Records are "final and conclusive on all officers of the government * * *," 60 Stat. 837, 5 U.S.C. 191a, we are faced with exactly the same situation as that involved in *United States* v. *Williams*, 278 U.S. 255. In *Williams*, the statute, which concerned adjusted compensation for veterans, provided: "The decisions of the Secretary of War * * * and the Director, on all matters within their respective jurisdictions under the provisions of this Act * * * shall be final and conclusive." In upholding the Director's decision, a unanimous Court held that the administrative decision "is final, at least unless it be wholly without evidential support, or wholly dependent upon a question of law, or clearly arbitrary or capricious" (*Id.*, at pp. 257-8). In *Estep* v. *United States*, 327 U.S. 114, the statute provided that the classifications made by local draft boards "shall be final except when an appeal is authorized in accordance with such rules * * * as the President may prescribe." This Court held that the classification

[7] But cf. *Burns* v. *Wilson*, 346 U.S. 137, 142; *St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38, 52; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 140.

could be overturned when it had "no basis in fact" (*Id.*, at p. 122). In *Sicurella* v. *United States*, 348 U.S. 385, this Court later held that the draft board's classification was subject to review when "erroneous as a matter of law" (*Id.*, at p. 391), and in *Simmons* v. *United States*, 348 U.S. 397 and *Gonzales* v. *United States*, 348 U.S. 407, it held that the draft boards' classifications could not be upheld when the procedures used were "unfair."

Moreover, Congress has guaranteed soldiers "certificates of discharge" upon their separation from the Army Establishment, 64 Stat. 145, 10 U.S.C. 652a, the purpose of which is to "record the separation from the military service and to specify the character of service rendered during the period covered by the discharge." AR 615-375, *Par.* (2)(*b*). Thus, in petitioner's case, the issue is one of law. Judge Bazelon states the problem clearly:

> "The issue [petitioner] raises is one of law: Whether [respondent] may withhold an honorable discharge from a soldier whose conduct and efficiency ratings have never been less than 'excellent,' even assuming the correctness of all the information [respondent] relies upon. That claim being 'wholly dependent upon a question of law' it is within the jurisdiction of the District Court * * * Nothing in *Gentila* v. *Pace*, *supra*, is to the contrary. *Nor can I accept it as settled (either by this court or the Supreme Court) that courts may not in circumstances like these review the issuance of a less than honorable discharge.*" 243 F. 2d 613, at pp. 626-7. [Emphasis supplied.]

Since this Court has said that "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial ques-

tions," *Sterling* v. *Constantin*, 287 U.S. 378, 401, we think it clear that a soldier's statutory right to a discharge certificate accurately reflecting the character of his service *in the Army* is subject to judicial protection. Cf. *Patterson* v. *Lamb*, 329 U.S. 539, 545.[8]

Furthermore, while it is true that petitioner demanded relief requiring respondent to issue him an "honorable discharge" certificate (R. 11), in the first instance he demands relief declaring invalid and unconstitutional the less than "honorable discharge" issued him for non-criminal and constitutionally-protected conduct extraneous to the character of his actual military service (R. 11, 25-26). Thus, even if we assume, *arguendo*, that the district court lacked jurisdiction to interfere with respondent's discretion and compel him to issue petitioner an "honorable discharge" certificate, it had ample jurisdiction to declare invalid and unconstitutional respondent's action which resulted in petitioner's less than "honorable discharge" for unconstitutional and invalid reasons. See, *e.g.*, *Perkins* v. *Elg*, 307 U.S. 325, 349-350. As Judge Bazelon's dissent makes clear:

> "That [petitioner] seeks, in addition to a declaration that the discharge given him was void, an order that he be given an honorable discharge does not, in my view, deprive the District Court Court of jurisdiction. If, upon review, the discharge given [petitioner] is declared to be void, we must assume that the Secretary would issue a discharge which is not void * * *. Moreover, if the District Court finds the denial of an honorable discharge to rest on legally insufficient grounds, it

[8] See also: *Judicial Review of Army Discharge Procedures*, 9 Stanford L. Rev. 170-182, (Dec., 1956).

may, at least, enjoin a denial for such reasons." 243 F. 2d 613, at p. 627.

B. As to Invalidly Authorized and Ultra Vires Administrative Action

Even in those cases ordinarily free from judicial scrutiny, or where Congress has said that administrative action is "final," judicial review may be had where the action challenged is bottomed on an unconstitutional, invalidly authorized, or *ultra vires* administrative regulation. See, *Stark* v. *Wickard*, 321 U.S. 288, 309-310; *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 140, 157. Such is petitioner's contention here. Since petitioner contends that Department of Defense Directive 5210.9, issued April 7, 1954 (which respondent claims was the authority for his action in the instant case) is unconstitutional and *ultra vires* (Point II, *infra*), the district court had ample jurisdiction to declare that the Directive, under which respondent's action was taken, was invalid, unconstitutional and void. To paraphrase the words of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123:

> "The objection to judicial [review] of an unauthorized exercise of powers is not weighty." *Id.*, at p. 157.

C. As to Constitutional Issues

The district court recognized the basic constitutional issue posed by this case: "We assume without question that the military cannot try a man for alleged criminal conduct committed prior to his entry into service. Does it not equally offend our traditional con-

cept of justice that a man who serves the military with a rating of excellent can be dismissed by it without being found disloyal, for non-criminal conduct which occurred primarily, if not exclusively, prior to induction, and can be furnished a discharge certificate which, by reflecting more than a record of military service, brings reproach and dishonor in civilian life?" (137 F. Supp. 475, 478). We think, therefore, the right to judicial review is clear. See, *e.g.*, Davis, *"Administrative Law,"* pp. 861-862. The classic statement of this principle was enunciated by the late Mr. Justice Brandeis:

> "When dealing with constitutional rights (as distinguished from privileges accorded by the Government * * *) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it." Concurring in *St. Joseph Stockyards Co.* v. *United States,* 298 U.S. 38, at p. 77.

In *Burns* v. *Wilson,* 346 U.S. 137, the statute involved, Article 76 of the Uniform Code of Military Justice, provided that "* * * the proceedings * * * of courts-martial * * * and all dismissals and discharges * * * pursuant to sentences by courts-martial * * * *shall be final and conclusive; and * * * binding upon all * * * courts * * * of the United States* * * *.*" 64 Stat. 132, 50 U.S.C. 663 (emphasis supplied). Nevertheless, this Court held that "* * * the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers * * * from crude injustices * * *." *Id.*, at p. 142. The crudeness of the injustice involved in the instant case may be seen from the fact that if, prior to

induction, Harmon had been a convicted felon, rather than the son of a man "reported to be a member of the Communist Party" (R. 3), he would have received an "honorable discharge." See, *Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 94,* 84th Cong., 2d Sess., November 18, 21, 1955, pp. 361, 431, 437, 439.

It is evident, therefore, that the holding in *Gentila* v. *Pace* (C.A.D.C.), 193 F. 2d 924, is limited by three exceptions, and that judicial review of the discharge certificate may be had (1) with respect to all questions of law; (2) where constitutional rights have been invaded; and (3) where the discharge certificate is issued pursuant to an unconstitutional or invalidly authorized administrative regulation.

II

DEPARTMENT OF DEFENSE DIRECTIVE 5210.9 WAS INVALIDLY AUTHORIZED, ULTRA VIRES, AND VOID

The Universal Military Training & Service Act authorizes the Secretary of Defense to prescribe *procedures* for the various Armed Services, in providing for the discharge of persons inducted under the Universal Military Training & Service Act. 62 Stat. 606, 50 U.S.C. App. 454(b). Congress also authorized the Secretary of the Army to establish procedures for the discharge of individuals from the Army prior to the expiration of their normal terms of service, 64 Stat. 145, 10 U.S.C. 652a. Purporting to act in accordance with this statutory authority, the Secretary of Defense issued Department of Defense Directive 5210.9 on April 7, 1954. The Directive provides that the standard for retention in the Armed Services shall be that retention shall not be inconsistent with the interests

of national security. *Directive, Par. VII(A)* (R. 36). The Directive further provides that the character of the separation certificate of the individual not retained *"shall be predicated upon the gravity of the reasonably substantiated information in derogation." Directive, Par. VIII(F)5* (R. 43).

Petitioner concedes that the Directive, to the extent it requires the removal of any soldier from the Army where retention is "not clearly consistent with the interests of national security" is validly authorized. 62 Stat. 606, 50 U.S.C. App. 454(b). But to the extent the Directive requires that the character of the soldier's separation certificate *"shall be predicated upon the gravity of the reasonably substantiated information in derogation,"* petitioner contends that it was not validly authorized, and was *ultra vires*, unconstitutional and void. Stated another way: While Congress may have authorized the Secretary of Defense to remove "security risks" from the Armed Forces, Congress did not, and could not, authorize him or the Secretary of the Army, or anyone else, to stigmatize an inductee for life with a less than "honorable discharge" by reason of constitutionally-protected pre-induction associations and activities which had nothing to do with the character of the actual military service the soldier performed.[9]

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[9] Rowland Watts, a leading authority in the field, points out:

> "This ['security'] purpose does not include the right to stigmatize a man for life for pre-induction activities which have nothing to do with the character of service he has rendered in the Army. * * * The Army has lost sight of the purpose of security within the Armed Forces. It has lost sight of its own declared policy. It has lost sight of the material with which it is dealing. * * * This 'material,' that we are considering, is young men in their late teens or early twenties and the period

The Universal Military Training & Service Act is based on the policy "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy." 62 Stat. 604, 50 U.S.C. App. 451(c). Such a "fair and just" system of selection could not in a democratic state include a political test. And it does not, so far as the Selective Service System is concerned. Men are selected quantitatively upon Armed Forces requisitions of need in accordance with legal restrictions upon the size of the military establishment. They are selected

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of their lives that we are considering is, roughly, from fifteen to twenty years of age. There are many Juvenile or Youth Courts which grant 'youthful offender' treatment to a boy who commits a serious crime during the great part of this period. No criminal record no life handicap is created. Not so the Army. It brands a man for his non-criminal, perfectly legitimate, activities at the age of fifteen. In one case, it has threatened to brand him for his alleged associations at the age of eight. It threatens to brand a man for the accident of having been born into a politically-unacceptable family. It threatens to brand him if he marries a girl whose family is politically unacceptable. This 'branding' is not a theoretical thing. A man with an 'Undesirable' discharge from the Army has little hope of getting an industrial job or any job with a productive future. * * * There was the day when the Army would 'eliminate' a person whose security status is questioned by giving him a discharge based 'on the character of service he had rendered.' But no more. * * * It is inconceivable that the Congress intended to delegate to the Army political and social control over every young man subject to the Selective Service law from the dawn of his mature understanding until he approaches thirty. Yet that is the effect of the Army's application of what it considers to be the law." Watts, "*The Draftee and Internal Security, A Study of the Army Military Personnel Security Program*" (New York, 1955), pp. 6-9.

qualitatively upon just and clearly defined criteria for classification and generally fair provisions for hearing and appeal. But just because the Selective Service System has declared a person eligible for, and liable to induction, does not mean that he will be inducted. The Army exercises its veto power over the selection at the point of induction and thereafter. The Army reserves the right to reject anyone it sees fit for whatever reason it sees fit. What is pertinent here, however, is not the validity of the political criteria employed by the Army in making such rejections after induction, but the validity of such criteria in stigmatizing a record of military service which, on other than political considerations, warrants an "honorable discharge." Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 139-140, 160; *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191.

Ordinarily, subject to the exception spelled out in the Department of Defense Directive:

> "An honorable discharge certificate will be furnished when the individual meets the following qualifications
>
> (1) Has character ratings of at least 'very good.'
>
> (2) Has efficiency ratings of at least 'excellent.'
>
> (3) Has not been convicted by a general court-martial.
>
> (4) Has not been convicted more than once by a special court-martial."
>
> *AR 615-360, Par. 8a.* Appendix, *infra*, at pp. 52-53.

An "Honorable Discharge" is a badge of honor, but it is limited to time and place and the particular character

of the military service rendered. It is not a certification that a man has not been a rogue in civilian life or that he will not become one after he is discharged. The nature and history of the military discharge certificate amply supports this conclusion.

A. The History of the Military Discharge Certificate

Ever since 1776 the Army has been required to issue a certificate of discharge to every soldier finally separated from the military service. Winthrop, *"Military Law and Precedents."* 961 (2d Ed., 1920). In 1788, the Secretary of War was vested with authority to prescribe the conditions under which the discharge should be issued (Winthrop, *op. cit., supra*, at p. 973), and this authority was continued through various reenactments of the Articles of War until the enactment of the Uniform Code of Military Justice in 1950, when by reenactment without material change the authority was vested in the Secretary of the Army by the Act of May 5, 1950, 64 Stat. 145, 10 U.S.C. 652a. Neither the present statute nor its predecessors defined the manner in which the Secretary was to exercise his discretion in regard to the issuance of discharge certificates. However, traditional Army discharge policy[10]

[10] To our knowledge, the first historical precedent was established by President Lincoln in 1864 in the case of *E. W. Andrews*, Adjutant to the Commander of the Defenses of Baltimore. President Lincoln's action in the *Andrews* case is recorded by Carl Sandburg, as follows: "Stanton the next day ordered that Andrews be mustered out of the service, no reason assigned, no questions asked Andrews. Word came to Andrews that Stanton, on hearing of Andrews' standing before an audience and saying he would vote for McClellan, raged and spoke threats of what he would do to Andrews. * * * Having heard the case the President gave his opinion: 'Well, that's no reason. Andrews has as good a right to hold on to his Democracy, if he chooses, as Stanton has to throw

has always required the discharge certificate to reflect the actual character of the military service rendered. Cf. *Patterson* v. *Lamb*, 329 U.S. 539, 545; *Davis* v. *Woodring* (C.A.D.C.), 111 F. 2d 523, 525. Moreover, the Army regulation interpreting the Act of May 5, 1950, 64 Stat. 145, 10 U.S.C. 652a, states that the purpose of the discharge certificate "* * * is to specify the character of service rendered *during the period covered by the discharge.*" *AR 615-375, Par. 2(b).*

As early as 1869, the Attorney General ruled:

> "Regularly, an officer or soldier, upon his discharge from the military service, is entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal, or unless he has been convicted of an infamous offense and is sentenced to punishment therefore during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, etc., with either of which conditions an honorable discharge would be incompatible." *13 Op. Atty. Gen. 16.*

Thereafter, in 1886, the Attorney General ruled:

> "Where a person entered the military service in August, 1862, as a volunteer, to serve for three years, and subsequently deserted, but afterwards voluntarily returned to service under the President's proclamation (of pardon) of March 11,

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his overboard. If I should muster out all my generals who avow themselves Democrats there would be a sad thinning out of commanding officers in the army. No, when the military duties of a soldier are fully and faithfully performed, he can manage his politics in his own way; we've no more to do with them than with his religion. Tell this officer he can return to his post * * * Supporting General McClellan for the Presidency is no violation of army regulations, and as a question of taste of choosing between him and Ae, well I'm the longest, but he's better looking." Sandburg, *III, Lincoln, The War-Years*, pp. 294-296.

> 1865, and was mustered out of service along with his company July 2, 1865, * * * the time which elapsed between his desertion and his return should not be credited to him in a discharge or otherwise, but he is entitled to have his actual service credited to him in an honorable discharge." *18 Op. Atty. Gen. 427.*

Again, in 1918, the Army's Judge Advocate General ruled:

> "A soldier who was dishonorably discharged in a previous enlistment was inducted in the service during the present emergency and served honestly and faithfully. Under such circumstances he is entitled to an Honorable Discharge at the end of his present service. *A bad record in a prior enlistment is immaterial in considering the character of the discharge to be granted from his present enlistment." (Dig. Op., J. A. G. (1912-1930). Section 271, p. 128, No. 220.89, Nov. 30 1918).* [Emphasis supplied.]

And, more recently, in 1954, former Secretary of the Army Stevens stated:

> "The traditional policy of the Army has been that the discharge given should reflect the service rendered. In other words, a man whose conduct has been faithful and honest *during the time in the service* would be entitled to separation under honorable conditions, notwithstanding what his conduct may have been prior to entering the service." *Hearings, Senate Armed Services Committee on S. 3096,* 83d Cong. 2d Sess., March 18, 1954, at p. 75. [Emphasis supplied.]

This is not only the traditional policy, but is the current policy in all other than "security risk" cases. AR 615-360, which is the Army regulation setting forth

the general provisions for discharge of enlisted personnel (including inductees), states in paragraph 7:

> "Because the type of discharge may significantly influence the individual's civilian rights and eligibility for benefits provided by law, it is essential that all pertinent factors be considered so that *the type of discharge will reflect accurately the nature of service rendered.*" [Emphasis supplied.]

Thus, the controlling statute defining respondent's authority over discharges, 64 Stat. 145, 10 U.S.C. 652a, reenacted by Congress without material change in 1950, incorporates within its terms traditional Army policy and the interpretive rulings of the Attorney General and the Army's Judge Advocate General under the pre-existing "Articles of War." See, *e.g.*, *United States* v. *Cerecedo Hermanos*, 209 U.S. 337, 339; *Commissioner* v. *Flowers*, 326 U.S. 465, 469. Nevertheless, the majority below held that the Army is not required to give an honorable discharge "to an enlisted man when it finds, on the basis of pre-induction activities, that his presence in the armed forces is not consistent with the national security." (243 F. 2d 613, at p. 620). We agree that respondent is authorized to establish regulations for the discharge of servicemen prior to the expiration of their normal terms of service. We agree that respondent is authorized to separate petitioner from the Army establishment for any reason deemed appropriate, including reasons of "national security." But while the Army may change the *grounds* for discharge, Congress has required that the facts regarding the *nature of the military service* be accurately set forth in the *type* of discharge certificate issued. Since former Private Harmon's service record

bears both character and efficiency ratings of at least "excellent,"[11] the discharge certificate was required to read: "Honorable Discharge."

B. The Nature of the Military Discharge Certificate

The military discharge certificate confers a valuable status, for it is "* * * a final judgment passed by the Government upon the entire military record of the soldier, and an authoritative declaration by it * * *," *United States* v. *Kelly*, 15 Wall. 34. Moreover it has conclusive effect on many civilian rights, both under federal and state law. *Fitchburg* v. *Lunnenberg*, 102 Mass. 358; *Cohen* v. *Mitchell*, 69 F. Supp. 54, aff'd (C.A.D.C.), 160 F. 2d 915, aff'd. 333 U.S. 411.[12] Indeed, in the case at bar, the district court stated: "To an honorable discharge accrue property rights, civil rights and community respect and honor" (137 F. Supp. 475, 478). Moreover, the Army recognizes the penal nature of the "undesirable" discharge[13] and this reality has not gone unnoticed by the judiciary. See, *e.g.*, *United States ex rel. Robinson* v. *Keating* (D.C. Ill.), 121 F. Supp. 447, 478-479; *Bernstein* v. *Herren* (D.C., S.D.N.Y.), 136 F. Supp. 493, 496.

[11] Respondent's suggestion below, (*Appellee's Br.*, pp. 4, 18-19, 28) that the "unknown" ratings on petitioner's service record militate in some way against his entitlement to an 'honorable discharge' is spurious and misleading. Army Regulations specifically provide that "[r]atings of 'unknown' and ratings for periods of less than two months are not disqualifying." *AR 615-360, par. 8b.* Accordingly, petitioner's entitlement to an "*honorable discharge*" by reason of the only "known" ratings on his service record, which are marked "excellent", both as to character and efficiency, is clear. See, *AR 615-360, par. 8a.*

[12] See, *Judicial Review of Army Discharge Procedures*, 9 Stanford L. Rev. 160, 178-9, n. 45 (Dec., 1956).

[13] *Ibid.*

Although the discharge certificate proffered petitioner has been "upgraded" from the "undesirable discharge" issued June 2, 1954 (243 F. 2d 613, 623, n. 2), a "general (under honorable conditions) discharge" is not an "honorable discharge". See, *AR 615-360, par.'s 7-9* (Appendix, *infra*, pp. 52-54). While a "general discharge" does not automatically deprive petitioner of Federal veterans' benefits, he will nonetheless be deprived of various and substantial benefits provided veterans by the State of New York. For example, only veterans holding "honorable discharge" certificates or their wives, widows and minor children may be entitled to certain burial benefits, *N. Y. Gen. Mun. L.*, § 148; the children of only those veterans holding "honorable discharge" certificates may be entitled to state educational scholarships, *N. Y. Educ. L.*, § 609; only veterans holding "honorable discharge" certificates may be entitled to retire at a younger age than others from the school system, *N. Y. Mil. L.*, § 245; and only "honorable discharge" certificates or "honorable service" certificates may be recorded so as to put public officials on notice of the facts set forth therein, *N. Y. Mil. L.*, § 250. To say, as does respondent, that petitioner would not be injured by the award of a "general discharge (under honorable conditions)," rather than an "honorable discharge," is to disregard the plain and unmistakable provisions of applicable state statutes and the tangible benefits for which they provide.[14]

But more important than the loss of the tangible benefits to which we have adverted is the stigma at-

[14] In this connection, it will be noted that the New York statutes make a marked distinction between an "honorable discharge" and a discharge "under honorable conditions." See, *e.g.*, and compare *N. Y. Educ. L.*, § 608 with *N. Y. Educ. L.* § 609. Cf. *Ops. Atty. Gen.* (N. Y.), 51 St. Dept. 381, 391 (1934).

tached to anything other than an "honorable discharge." To say, as does respondent, that no stigma attaches to the "general (under honorable conditions) discharge" is to hide from reality. Or, as Judge Bazelon put it in his dissent below:

> "But whatever may be said of the technical legal equivalence or difference between the two types of discharge, from a real-life point of view they are vastly different. The portion of our population holding honorable discharge certificates from the armed services is now so great that an adverse reflection is inherent in a certificate which is other than 'honorable.' This is, of course, confirmed by the statement of [respondent's] counsel in oral argument that 'every soldier gets an honorable discharge unless there is some blemish on his record on account of which he receives a discharge other than honorable.' " 243 F. 2d 613, at p. 625.

These facts have been recognized by the recent decision in *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, where the late Judge Jerome Frank noted plaintiff's argument that a "less than honorable discharge may have important adverse effects on a veteran's eligibility for various benefits under federal and state law,[15] and on his success in obtaining private or governmental employment.[16] * * * Besides this direct pecuniary harm, it involves a social stigma likely to harm plaintiff substantially. * * * Such effects may be aggravated by the requirement that the discharge papers of persons who do not complete their normal tour of duty, but are separated pursuant to AR 604-10 * * *, contain the statement 'AR 604-10 applies,' thus publicly proclaiming

[15] *Id.*, 234 F. 2d 135, n. 2.

[16] *Id.*, 234 F. 2d 135, n. 3.

that the Army considers such persons to be security risks." *Id.*, 234 F. 2d, at p. 135.

In the case at bar, if we assume *arguendo* that the words "AR 604-10 applies" will not appear on petitioner's corrected discharge certificate (R. 114), respondent, in the words of Judge Frank, will not have "aggravated" the "direct pecuniary harm" and the "social stigma" otherwise caused by the proffered "general discharge." However, the absence of the words "AR 604-10 applies" on petitioner's discharge certificate means only that, instead of publicly proclaiming him a "security risk," the Army says petitioner is either militarily inept, a homosexual, disloyal, or, perhaps, subversive.[17] In any event, the various comments made by Senators and officials of the Department of Defense during the *Hearings* before the *Senate Committee on Armed Services on S. 3096*, 83rd Cong., 2d Sess., March 18, 24 April 1, 8, 1954, bear striking witness to the *substandard* character of the "general discharge." See, *Hearings*, *id.*, at pp. 44, 45.

[17] This was made clear during the hearings before the Senate Sub-Committee on Constitutional Rights on the 18th day of November, 1955:

"Private Ross: I believe it had subversives and disloyal, because I looked that up. I know it had them. But I think it also had homosexuals, and so forth.

"Mr. Hocker: So that anybody who reads that paper—

"Private Ross: Will get the impression—

"Mr. Hocker: And then reads the certificate you give him, will have the choice of deciding whether you are subversive or disloyal or homosexual?

"Private Ross: That is right." *Hearings, Sub-Committee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 91, 84th Cong., 2d Sess.* p. 442.

74, 75, 76, 128, 132, 133, 152, 153. As Senator Kefauver aptly stated:

> "Some might say that that doesn't mean much, but if they go to apply for a position or a job, and it is * * * any kind of discharge other than honorable, ordinarily they may as well not apply because they are not going to get a job. You can do all the explaining in the world, but there isn't a chance, if it doesn't say 'honorable.' " *Id.*, at p. 153.

In the dissent below, Judge Bazelon pointed out that "[i]t may well be, as [respondent] states, that none of the benefits available to discharged soldiers under federal law are withdrawn from the holder of such a 'general' discharge as this. Many benefits are conferred, however, by the statutes of the State of New York, where [petitioner] resides, and those statutes all use the language 'honorable discharge' or 'honorably discharged.' Although the New York courts have not decided whether this excludes holders of a discharge entitled 'General (under honorable conditions),' the late Judge Frank of the Court of Appeals for the Second Circuit suggested that it would. * * * Nor is the new form of discharge defensible on the ground that the separation report does not on its face indicate that it was based on security consideration. The same observation could be made concerning the 'undesirable' discharge. In both instances, however, a person sufficiently interested to check army regulations would discover the 'security' character of the discharge." (243 F. 2d 613, at p. 625.).

In petitioner's case, the "general discharge" certificate inflicts even more damage. As a law student and prospective candidate for admission to the Bar of the

State of New York (R. 2), the character of the proffered certificate erects a serious obstacle to petitioner's prospective career (R. 116-117).[18] Solely because petitioner engaged in non-criminal, constitutionally-protected conduct (which occurred primarily, if not exclusively, prior to induction), he is proffered a "general discharge," although his exemplary record of military service clearly entitles him to an "honorable" one. See, *AR 615-360, par. 8a.* In such circumstances, and where the "general discharge" jeopardizes petitioner not only in his profession, his job opportunities and reputation, but also extinguishes his right to valuable veterans' benefits provided by the laws of New York, we think it clear that the nature of his proffered discharge certificate causes him serious injury.[19]

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[18] Cf. *Konigsberg* v. *State Bar of California*, 353 U.S. 252; *Schware* v. *Bar Examiners of New Mexico*, 353 U.S. 232; Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480, (1953).

[19] Commenting on this very issue, the *Stanford Law Review* notes: "The Army has furnished ex-private Harmon with a 'general' discharge under honorable conditions, and the Government is now urging that the case has become moot. • • • With a minor exception giving preference to honorably discharged veterans in the appointment of federal court criers and bailiffs, 28 U.S.C. § 775 (1952), this will entitle him to the same federal veterans' benefits as he would have been entitled to under an 'honorable' discharge. • • • However, many state benefits hinge on an 'honorable' discharge. See Zearing v. Johnson, 10 Cal. App. 2d 654, 52 P. 2d 1019 (2d Dist. 1935); Horyley v. New York State Bonus Comm'n., 220 App. Div. 345, 221 N.Y. Supp. 548 (3d Dept. 1925). The plaintiff may suffer such losses in his home state. • • • The 'general' discharge by its very nature, and the report of separation since it indicates as authority for discharge the personnel security regulation, U.S. Army Reg. No. 604-10 Par. 19(b) will stigmatize him for life." *Judicial Review of Army Discharge Procedures*, 9 Stan. L. Rev. 170, 171 n. 4, (Dec., 1956).

C. The Necessity for Restrictive Construction.

This Court has repeatedly held that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401. See also: *United States* v. *Rumely*, 345 U.S. 41, 45. It also has held that Congressional enactments must be limited to "*the least possible power adequate to the end proposed.*" See, *Anderson* v. *Dunn*, 6 Wheat. 204, 231; *United States ex rel Toth* v. *Quarles*, 350 U.S. 11, 15-16. If, as contended by respondent, Department of Defense Directive 5210.9; *Par. VIII(F)5*, was validly authorized by the Universal Military Training & Service Act of 1948, 62 Stat. 606, 50 U.S.C. App. 454(b), and if respondent's action in the instant case was authorized by the Act of May 5, 1950, 64 Stat. 145, 10 U.S.C. 652a, those statutes are unconstitutional.

The court below held that inasmuch as petitioner conceded that the Army could discharge him on mere suspicion that he was a security risk, "it could include that consideration among the factors to be considered in determining the value of his services, and, consequently, in selecting the type of discharge to be given him." (243 F. 2d 613, at p. 620).[29] Accepting this

[29] Respondent's argument, apparently adopted by the majority below, that the Army's concern with "morale and discipline is sufficient justification * * * for its policy of not giving security risks the same award of honorable service given exemplary soldiers" (*Appellee's Br.* p. 24) is absurd. See, *e.g.*, testimony of Hugh M. Milton II, Assistant Secretary of the Army, *Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 91*, 84th Cong., 2d Sess., November 22, 1955, pp. 529-536. The historical facts demonstrate that a man's parents, allegedly "subversive," or his political "state of mind," do not

assertion on its face, it is readily apparent that what Judge Prettyman is saying is that if, on the basis of non-criminal acts and associations extraneous to the character of petitioner's military service, the Army can determine that the petitioner's "state of mind" during his period of service was not a desirable one, then the Army has the right to visit upon petitioner a less than honorable discharge, whether or not that "state of mind" induced overt or affirmative acts considered derogatory in connection with his military duties. But cf. *American Communications Association* v. *Douds*, 339 U.S. 382, where the late Mr. Justice Jackson said "[t]hought control is a copyright of totalitarianism and we have no claim to it." *Id.*, at p. 442.

Accordingly, and in line with the settled policy of restrictive statutory construction to avoid unconstitutionality, to the extent that Department of Defense Directive 5210.9 requires the character of an inductee's discharge certificate, whenever retention in the service is deemed "inconsistent with the interests of national security," to be based "*on the gravity of the reasonably substantiated information in derogation*," (*Directive, Par. VIII(F)*5) we think this Court must

militate against his being an "exemplary soldier." A most cogent example during World War II was the 442nd Regimental Combat Team. This organization, which won a Presidential unit citation for heroism in combat in the European Theatre of Operations, was made up of Nisei, most of whose parents were imprisoned in detention camps during World War II because of suspected "disloyalty." While it may be inconceivable to the Secretary of Defense (*See, Hearings before the Senate Armed Services Committee on S. 3690*, 83rd Cong., 2d Sess., March 18, 1954, p. 44), these realistic "security risks" were given honorable discharges upon their separation from the military service "the same as the millions of fine men that have fought for our Nation and have given loyal service" (*Ibid.*).

hold the Directive to be invalidly authorized, *ultra vires*, and void.

III

THE ACTION OF RESPONDENT WAS IN VIOLATION OF THE FIRST, FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION

Petitioner does not complain of the fact of his separation from the Army. He complains only of the "badge of infamy" he must wear the rest of his life because of alleged "subversive" conduct and associations, and the manner in which the destruction of his good name and personal honor was accomplished. Cf. *Wieman* v. *Updegraff*, 344 U.S. 183, 191.[21]

A. With Respect to the Sixth Amendment

It has been clearly settled that executive action resulting in a determination that an organization or individual is disloyal, subversive or a "security risk" can-

[21] Respondent has admitted "that his action was taken without any hearing, without any confrontation or cross-examination of witnesses by [petitioner] and without 'a statement of the reasons [petitioner] was determined to be an undesirable' • • •" (R. 16). It must be noted that the constitutional issues in this case are relevant, not to petitioner's separation from the Army Establishment, but to his stigmatization for life with a less than "honorable discharge" for constitutionally protected and non-criminal conduct occurring primarily, if not exclusively, prior to induction. If the Army had furnished petitioner a discharge certificate accurately reflecting the nature of his military service, no "hearing" or other "procedural due process" would have been required. Here, as in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, the issue, at least in part, is petitioner's right to freedom from Government defamation. *Id.*, at pp. 139-140, 160. Thus respondent's action, resulting in petitioner's less than "honorable discharge," clearly violated "procedural due process." *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U.S. 292, 300; *Morgan* v. *United States*, 304 U.S. 1, 18; *Gonzales* v. *United States*, 348 U.S. 407; *Parker* v. *Lester* (9 Cir.), 227 F. 2d 708.

not be made without some sort of hearing. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123. In the case at bar, former Private Harmon could not have been given a less than "honorable discharge" without providing him all the safeguards of a judicial trial, or in the alternative, the safeguards of a General Court-Martial under the Uniform Code of Military Justice, 64 Stat. 108, *et seq.*, 50 U.S.C. 551, *et seq.* Cf. *United States* v. *Lovett*, 328 U.S. 303. In *Lovett*, this Court held that a *permanent* dismissal from government service for subversion or disloyalty is "punishment," and that due process of law requires that an accused employee be given all the safeguards of a judicial trial before it is imposed. None of these safeguards were provided Private Harmon. He wasn't even granted a hearing! It will be noted that respondent's action does not violate the Sixth Amendment unless it can be said that the administrative determination separating petitioner from the Army with a less than "honorable discharge" on the grounds of being "disloyal," "subversive," or a "security risk" inflicted punishment upon him without a judicial trial. "Punishment" is a prerequisite. Cf. *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716. In a different context, "punishment" has been defined as follows:

> "The theory upon which our political institutions rests is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and

> .can in no other wise be defined." *Cummings* v. *Missouri*, 4 Wall. 277, 321-322.

This Court will undoubtedly note that petitioner was discharged under the provisions of Department of Defense Directive 5210.9. Paragraph VIII(F)(6) of that Directive provides:

> "In the case of separation of any member of the Armed Services, under conditions outlined in the preceding subparagraph, the DD Form 214 (Report of Separation) will cite as authority the appropriate Armed Service directive under which separation is effected." (R. 43)

Respondent notwithstanding, petitioner has not yet received a "general (under honorable conditions) discharge." He has been offered one (R. 110-112). The DD Form 214 (Report of Separation) proffered petitioner does not contain the words "AR 604-10" in paragraph 8 thereof (R. 113). Nevertheless, the words "AR 604-10 SPN 82" are required to be cited in paragraph 8. See, *Army Regulation* (AR) 604-10, par. 19(b).[22] In other words, petitioner's "Official Report of Separation from the Armed Forces" is required by regulation to stigmatize petitioner as a "security

[22] Paragraph 19(b) of the Army's "security risk" directive (AR 604-10) provides:

> "The Report of Separation From the Armed Forces of the United States (DD Form 214) of members discharged under the provisions of these regulations will indicate in item 8: 'AR 604-10 APN 82.' The letter of separation and/or discharge certificate of officer and enlisted reservists not on active duty will indicate: 'AR 604-10 applies.' Members relieved from active duty or discharged prior to completion of an action under these regulations will have 'Paragraphs 9 and 20 (as appropriate), AR 615-120 applies' entered in item 38, DD Form 214."

risk." *Schustack* v. *Herren* (2 Cir.), 234 F. 2d 134, 135. Inasmuch as petitioner has not yet received the "general (under honorable conditions) discharge" proffered him on June 6, 1956, it must be presumed that respondent will correct this omission from petitioner's DD Form 214 in conformity with the requirements of Department of Defense Directive 5210.9, par. VIII C 3 (6); and AR 604-10, par. 19(b). See *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 142-143; *R. H. Stearns Co.* v. *United States*, 291 U.S. 54, 63; *United States* v. *Chemical Foundation*, 272 U.S. 1, 14-15.

Viewed in this light, an assertion that petitioner has not suffered "punishment" is little short of ludicrous, especially where, as here, Department of Defense Directive 5210.9 and AR 604-10 require petitioner's "Official Report of Separation from the Armed Forces of the United States" to bear the notation for all the world to see: "AR 604-10 [the security risk regulation] applies." In the context of popular opinion in this country today, it is difficult to conceive of a deeper stain, or greater infamy. *Wieman* v. *Updegraff*, 344 U.S. 183, 190-191. With a "General Discharge" identified as a discharge under security regulations, it permanently stigmatizes a man with the concomitant result that he is barred for life from major areas of gainful employment.[23] A determination that an in-

[23] Rowland Watts, a leading authority in the field, has said with regard to the "General Discharge Under Honorable Conditions," that:

"AR 615-360 states that, 'The effects of an honorable discharge and a general discharge are identical and entitle an individual so discharged to full rights and benefits.' While this is technically true under the letter of federal law, it is not always

dividual is a "security risk" now renders it impossible for him to obtain employment in the Federal Government, or in state or local government; opportunities in private employment are either drastically diminished or completely extinguished. In many professional fields, such a person must abandon his life's work. Specific industries, such as the maritime, or the motion picture industry, or other industries engaged in work on Government contracts, are closed to

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true under varying state laws and is generally not true as far as private employment is concerned. As the discharge certificate in these cases has typed on it '[AR 604-10] applies'—which only means 'Disloyal and Subversive'—it is an effective bar to all public employment, virtually all defense industry employment, and most other private employment where the discharge certificate has to be shown. It is generally recognized that a General discharge is 'sub-standard.' In the absence of the 'Disloyal and Subversive' identification, it is used in such cases as military ineptitude or minor manifestations of homosexual propensities. The Army is so aware of its lesser value that the regulations provide: 'Notwithstanding the foregoing criteria * * *, when disqualifying entries in the individual service record during current service are outweighed by subsequent honest and faithful service over a greater period of time, an honorable discharge may be furnished. * * * In addition, careful consideration will be given to the nature of the offenses and sentence adjudged by a court-martial in applying the provisions of *a*(3) and (4) above, and when, in the opinion of the officer effecting discharge, these have been not too serious and severe, and the remainder of the service in the enlistment has been such that an honorable discharge would have been granted had the conviction not occurred, an honorable discharge certificate may be awarded.' (AR 615-360, par. 8b.) * * * Yet the General discharge has become the general dumping ground for all those against whom security charges are brought although the charges have not been 'proved' even by the Army's dubious standards of proof. 'It is the Army's way of creating the label of 'Almost Subversive.'' Watts, "*The Draftee and Internal Security, A Study of the Army Military Personnel Security Program*," (New York, 1955), pp. 80-81.

him. Other industries unofficially refuse to admit him, and if he were to attempt to secure employment in a foreign country, he would find it difficult to secure a passport. On the personal level, his reputation is blighted and the social status of his family impaired. Marked for life, his reputation as well as his ability to earn a livelihood is seriously jeopardized. Indeed, so far as the public is concerned, the term "security risk" is synonymous with "traitor."[24]

B. With Respect to the First and Fifth Amendments

Petitioner's First Amendment rights were abridged when he was furnished a less than "honorable discharge" as a security risk. In *American Communications Association* v. *Douds*, 339 U.S. 382, Chief Justice Vinson stated:

> "But * * * the fact that no direct restraint or punishment is imposed on speech or assembly does not determine the * * * question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." *Id.*, at p. 402.

Petitioner's "identifying arm-band" is his less than "honorable discharge" certificate, worn for life by

[24] See, *e.g.*, *Hearings, Senate Sub-Committee, Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., June 3, 9, 23, August 30, 21, 1955 at pp. 67, 121-122, 130, 271, 550, 573, 599, 627. See also: *Hearings, Subcommittee on Constitutional Rights, Senate Judiciary Committee, pursuant to S. Res. 91*, 84th Cong. 2d Sess., November 18, 22, 1955, pp. 361-362, 393-394, 526-527.

reason of the exercise of his First Amendment rights. Furthermore, the *Douds* case specifically holds that a limitation on First Amendment guarantees is permissible only when that limitation finds justification in the safety of the community or the safety of the nation. Cf. *Cole* v. *Young*, 351 U.S. 536. But here, we think there is no justification in the interests of national security for furnishing petitioner a discharge certificate, which instead of reflecting his record of excellent military service, brings him reproach and dishonor in civilian life.[25] See, *e.g.*, *McTernan* v. *Rodgers* (D.C., Cal.), 113 F. Supp. 638, 640; *Lawson* v. *Housing Authority*, 270 Wis. 269, cert. den., 349 U.S. 941. Nevertheless, the majority below said: "Activity in the Communist movement now involves a possible conspiratorial participation dangerous to the security of this country * * *. Activity in the world Communist movement has long since passed the boundaries of mere political opinion. It may well make a man a security risk, and, as we have pointed out, the courts cannot compel the Army to retain a security risk in its service" (243 F. 2d 613, at p. 620). Whatever a "security risk" is, we agree that the courts cannot compel the Army to retain "one" in its service. *But we think this argument beside the point.* Petitioner took pains to make clear below that the First and Fifth Amendment issues of his case had nothing to do with his retention in or discharge from the military establishment. It was applicable only to the "badge of dishonor" worn for life because of legal acts and associations, and because he was the son of a man "reported to be a member of the

[25] 137 F. Supp. 475, at p. 478.

Communist Party" (R. 3). Our assertion is fortified by Judge Bazelon:

> "[Petitioner] does not challenge the [respondent's] power to remove him from the Army on mere suspicion that he is a security risk. But, whether or not the interests of national security justify dismissing a soldier on mere suspicion, [petitioner] claims that these interests are not served by branding such a soldier as a security risk as he passes through the gate." 243 F. 2d 613, at p. 626.[26]

The Army had the power to discharge Harmon if it was not satisfied to keep him in the service, but it could not discharge him and defame him at the same time.[27] If Harmon had engaged in "seditious conduct" while in the Army he could have been court-martialed under Article 94 of the Uniform Code of Military Justice, 64 Stat. 136, 50 U.S.C. 688, but he was not court-martialed, for he engaged in no wrong-

[26] In this connection, it is clear that respondent's action, in no way justifiable in the national security interest, was arbitrary, and thus a violation of petitioner's right to *substantive* "due process." *Wieman* v. *Updegraff*, 344 U.S. 183.

[27] Actually, the discharge certificate imposed on petitioner for being an alleged "security risk" is nothing other than "infamy," historically analogous to the Roman institution of "*Infamia*." Cf. *Ullman* v. *United States*, 350 U.S. 422, 449-454 (Douglas, J., dissenting). One noted legal historian has stated that *infamia* was "* * * a moral censure pronounced by a competent authority in the State on individual members of the community, as a result of certain actions which they had committed, or certain modes of life which they had pursued, this censure involving disqualification for certain rights both in public and in private law." *Greenridge*, "*Infamia*," [1894], p. 37. See also: Buckland, "*A Textbook of Roman Law From Augustus of Justinian*," (2d Ed. 1932) p. 91; Livingston, "*A System of Penal Law for the State of Louisiana*," (1833) p. 63.

doing while in the Army or prior to induction. Since petitioner's military service was unquestionably "honorable," because the character and efficiency of his military service was concededly "excellent" (*AR 615-360, Par. 3a*), respondent's action violated petitioner's rights under the First and Fifth Amendments. Cf. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX

Constitution

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

Act of May 5, 1950, 64 Stat. 145, 10 U. S. C. 652a.

"No enlisted person, lawfully inducted into the military service of the United States, shall be discharged from said

service without a certificate of discharge, and no enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial."

Section 4(b) of the Universal Military Training & Service Act of 1948, 62 Stat. 606, 50 U. S. C. App. 454(b).

"Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty four consecutive months, unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section]."

Act of June 22, 1944, 58 Stat. 286, 38 U. S. C. 693h:

"The Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy, after conference with the Administrator of Veterans' Affairs, are authorized and directed to establish in the Army, Air Force and Navy Departments, respectively, boards of review composed of five members each, whose duties shall be to review, on their own motion or upon the request of a former officer or enlisted man * * *, the type and nature of his discharge or dismissal, except a discharge or dismissal by reason of the sentence of a general court martial. Such review shall be based upon all available records of the service department relating to the person requesting such review, and such other evidence as may be presented by such person. Witnesses shall be permitted to present testimony either in person or by affidavit and the person requesting review shall be allowed to appear before such board in person or

by counsel * * * Such board shall have authority, except in the case of a discharge or dismissal by reason of the sentence of a general court martial, to change, correct, or modify any discharge or dismissal, and to issue a new discharge in accord with the facts presented to the board. The Articles of War and the Articles for the Government of the Navy are amended to authorize the Secretary of the Army, the Secretary of the Air Force, and the Secretary of the Navy to establish such boards of review, the findings thereof to be final subject only to review by the Secretary of the Army, the Secretary of the Air Force, or the Secretary of the Navy, respectively * * * ".

Act of August 2, 1946, 60 Stat. 837, 5 U. S. C. 191a.

"(a) The Secretaries of the Army, Navy, and Air Force, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective Departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct an error or remove an injustice, and corrections so made shall be final and conclusive on all officers of the Government except when procured by means of fraud * * * ".

Regulations

Army Regulation 615-375, Paragraph 4 (a) (b).

"The purpose of a discharge certificate is to record the separation of an individual from the military service and to specify the character of service rendered during the period covered by the discharge."

Army Regulation 615-360, Paragraphs (7) through (9).

"Factors Governing Issuance of Honorable and General Discharge Certificates

7. *General considerations.*—Because the type of discharge may significantly influence the individual's civilian rights and eligibility for benefits provided by law, it is essential that all pertinent factors be considered so that the type of discharge will reflect accurately the nature of service rendered. It is the policy of the Department of the Army to base evaluation of an individual's service and character on his over-all enlistment period rather than on any disqualifying entries in his service record during a particular portion of his current service. The effects of an honorable discharge and a general discharge are identical and entitle an individual so discharged to full rights and benefit. The undesirable discharge may or may not deprive the individual of veteran's benefits administered by the Veterans Administration and a determination by that agency is required in each individual case to fix the individual's rights. A dishonorable discharge deprives the individual of all veteran's benefits and may operate to deprive him of civil rights.

8. *Honorable discharge.* a. Except as provided in these regulations and pertinent regulations listed in paragraph 13, an honorable discharge certificate will be furnished when the individual meets the following qualifications:

(1) Has character ratings of at least 'very good.'

(2) Has efficiency ratings of at least 'excellent.'

(3) Has not been convicted by a general court-martial.

(4) Has not been convicted more than once by a special court martial."

b. Notwithstanding the foregoing criteria, when disqualifying entries in the individual's service record during current service are outweighed by subsequent honest and faithful service over a greater period of time, an honorable discharge may be furnished. Ratings of "unknown" and ratings for periods of less than 2 months are not disqualifying. (See par. 3-7a (2), SR 615-20-1.) In addition, careful consideration will be given to the nature of the offense and sentence adjudged by a court-martial in applying the provisions of a (3) and (4) above, and when, in the opinion of the officer effecting discharge, these have not been too serious and severe, and the remainder of the service in the enlistment has been such that an honorable discharge would have been granted had the conviction not occurred, an honorable discharge certificate may be awarded.

2. *General discharge.* Individuals discharged under honorable conditions which do not qualify them for an honorable discharge will be furnished a general discharge, except as provided below. Officers effecting discharge are authorized and required to deviate from this criteria and furnish an honorable discharge when, after considering all aspects of the individual's service, it appears that furnishing a general discharge would not be in the best interest of the service or the individual. Specifically, the above criteria may be deviated from in the following instances:

a. Regardless of previous record, an individual who has received a decoration or award, including a commendation ribbon or a lifesaving medal, will, provided his record subsequent to the act for which he was decorated, awarded, or commended would so entitle him, be furnished an honorable discharge.

b. An individual being separated with severance pay under the AR and SR 680-450 series will normally be furnished an honorable discharge.

c. When it is apparent from inconsistent entries in the service record that furnishing a general discharge is not warranted, an honorable discharge may be furnished (i. e., when ratings given are disqualifying but promotion with no subsequent reduction was given during period covered or when disqualifying ratings were given but individual was favorably considered for Good Conduct Medal at the same time).